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IN THE

Supreme Court of the United States

October Term, 1960

No. 111

BURTON N. PUGACH,

Petitioner,

—against—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming a judgment dismissing the complaint and vacating a stay in an action brought in the United States District Court for the Southern District of New York against the District Attorney of Bronx County and the Police Commissioner of New York City for a permanent injunction restraining the use by them, and their agents and employees, on the forthcoming trial on two indictments against the petitioner from the use of certain wiretap evidence.

Opinions Below

The majority opinion of the Court of Appeals and dissenting opinion (App. A) has not yet been reported. The majority opinion of the Court of Appeals (App. B) and dissenting opinion on the temporary order staying respondent from use at the trial of the wiretap evidence has not yet been reported. The District Court's opinion in denying petitioner's motion for a preliminary injunction and granting the respondent's motion to dismiss the complaint has been reported. *Pugach* v. *Sullivan*, 180 F. Supp. 66 (S. D. N. Y. 1960).

Jurisdiction

The judgment of the Court of Appeals was entered on April 14, 1960 (App. C). A petition for rehearing was denied on April 26, 1960 (App. D). The jurisdiction of this Court is invoked under 28 U. S. C. 1337, 1343.

Question Presented

Whether in a state criminal prosecution the Federal Court can enjoin state officials from using, at a trial, evidence obtained by state police in violation of Sec. 605 of the Federal Communications Act.

Statute Involved

Act of June 19, 1934, c. 652, §605, 48 Stat. 1103, 47 U. S. C. §605:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any inter-

state or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Statement

An indictment was returned against the petitioner, Burton N. Pugach, an attorney admitted to practice in the State of New York, and others, by the Grand Jury of Bronx County, New York, which indictment charged the petitioner with the crimes of burglary in the second degree, maiming, assault in the second degree and conspiracy. Another indictment charges petitioner with felonious possession of firearms.

The present action was brought in the United States District Court for the Southern District of New York against the District Attorney of Bronx County and the Police Commissioner of New York City for a permanent injunction restraining the use by them and their agents and employees on the forthcoming trial of certain wiretap evidence. A motion for a preliminary injunction was denied and the complaint was dismissed by the District Court.

Petitioner appealed to the Circuit Court of Appeals from the order denying a preliminary injunction and dismissing his complaint. Petitioner moved the Court of Appeals for a stay pending appeal. The motion was granted by order dated February 11, 1960. For the opinion of the Court of Appeals in granting stay pending appeal see App. B.

It is not disputed that the respondents, or their agents, on June 15, 1959, procured an order of the Supreme Court of the State of New York permitting Pugach's office telephone wires to be tapped; that they were tapped; and the contents of the wiretaps were divulged to the Grand Jury, and that the District Attorney intended to make use

of such evidence at the trial. The District Attorney has not denied that he expects to use the wiretap evidence, nor does he contest petitioner's allegation that the appellant will be subject to irreparable injury if convicted by means of such evidence (See Statement of Facts in the opinion of Judge Medina App. B and Judge Lumbard App. A).

Petitioner's contention is succinctly and clearly stated by Judge Medina (App. B) wherein he states, as follows:

> "Pugach's argument is: that Section 605 of the Federal Communications Act makes it a federal crime to tap a telephone and 'divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication'; that defendants or their agents are about to commit this federal crime by further divulging and offering the wiretaps in evidence at the trial; that the Supreme Court has in effect held in *United States* vs. *Benanti*, 1957, 355 U. S. 96, that the constitutional and legislative authorization of wiretaps by the State of New York is illegal and void; that if the evidence is received at the trial and Pugach is convicted he will be wholly without remedy, since under *Schwartz* v. *Texas*, 1952, 344 U. S. 199, which is still in effect, the evidence will be admissible under the New York rules of evidence, even though illegally obtained, and his conviction will not be reversed. He also claims that the result of such violations of federal law will deprive him of his liquor license and his license to practice law. Pugach argues that, unless we gant the injunctive relief he prays, defendants and their agents will go ahead and violate the federal statute with impunity, shielding themselves behind a constitutional and legislative scheme of the State of New York that has been held by the Supreme Court to be invalid. *This is a powerful argument and we have been unable to find any satisfactory answer to it*" (Italics ours).

Reasons for Granting Writ

The problem before this Court is an old and venerable one. The conflict between State and Federal powers. *Benanti* v. *U. S.*, 355 U. S. 96, seemingly resolved this problem with respect to Sec. 605 of the Communications Act when it stated at pages 105-106, as follows:

> "In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find, that Congress, setting out a prohibition in plain terms, did *not mean to allow state legislation which would contradict that section and that policy.*" (Italics ours)

Footnote 18 reads:

> "In passing, it should be pointed out that several Attorneys General of the United States have urged Congress to grant exceptions to Sec. 605 to federal agents under limited circumstances. See, e.g., Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H. R. 762, 867, 4512, 4728, 5096, 84th Cong., 1st Sess. 28; Rogers, The Case for Wire Tapping, 63, Yale L. J. 792 (1954). But Congress has declined to do so. In view of this, it would seem unreasonable to believe that Congress is willing to allow this same sort of exception to state agents with no further legislation on its part."

Further, Judge Medina, in his opinion (App. B), stated as follows:

> "Moreover, the fact that the wiretapping is authorized pursuant to the Constitution and legislation of the State of New York, pursuant to which New York judges continue to order wiretapping and police

officers do the wiretapping and divulge the contents of the wiretaps in their testimony, even after the Supreme Court has held these constitutional and legislative provisions to be an invasion of a field *pre-empted by the Congress, makes the position of defendants even more untenable.*" (Italics ours)

Judge Waterman's opinion is also of interest when he states as follows (App. B) at page 738:

"Moreover, there is uncertainty among the State officers themselves. At least one of the Justices of the New York Supreme Court refuses to sign orders authorizing wiretaps on the ground that they are now clearly illegal under the ruling of the Supreme Court in *United States* v. *Benanti*, 355 U. S. 96 (1957). *Matter of Interception of Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84 (1958) (per Hofstadter, J.). But, as disclosed by the affidavits now before us, other Justices of the New York Supreme Court pursue a contrary course and numerous orders authorizing wiretaps are issued. This leaves in the middle conscientious New York State and municipal police officers who have tapped wires pursuant to court order. It could well be that some of them, as the occasion presented itself, might be prosecuted for violating Section 605 when they divulge or publish what they have thus obtained. Such a divulgence would be in violation of the plain prohibition of the Section. Therefore, if at all possible to do so, it is in the *public interest to have the present anomalous state of affairs clarified.*" (Italics ours)

Judge Clark, in his dissenting opinion, stated as follows, (App. A) at page 1414:

"In its latest pronouncement upon the issue, the Supreme Court of the United States has refused to

find exception for state officers from the sweeping federal ban on unauthorized interception and divulgence of 'any communications,' contained in Sec. 605 of the Federal Communications Act, 47 U. S. C. Sec. 605. Speaking through the Chief Justice of the United States, a unanimous Court finds 'that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy.' And it points out the failure of Congress to grant exceptions, though strongly importuned to do so. *Benanti* v. *United States*, 355 U. S. 96, 105, 106.

Notwithstanding its decisive character, there is nothing surprising in the Court's statement; indeed, it would have been surprising had the Court said less. For the absolute character of the prohibition has been steadily emphasized over the years and the attempt to make the statute say less than it does has been conspicuously unsuccessful. So we must accept the interpretation that wire tapping, whether by state officers or by anyone else, is simply and shortly forbidden by federal law, subject to severe penalties of fine and imprisonment. 47 U. S. C. Sec. 501. Attack must therefore be limited to the need of new legislation because of its hampering effects on law enforcement of prosecuting officials cannot have the benefit of at least 'controlled' wire tapping. Involved are surely weighty arguments of public policy which the legislative body should weigh. But these arguments have not as yet prevailed with the only governmental agency having authority to act to modify the existing law, and I do not see how they can affect the responsibility of United States judges to enforce that law. *Hence for us I see no escape but to start with the premise that we are faced with repeated open and acknowledged violations of federal law*

which we are assured will be continued until and unless federal authorities intervene.

Thus we have an absolute impasse going so far as to be almost ludicrous if the issue were not so fundamentally serious." (Italics ours)

Further, Judge Clark, stated, at page 1417, as follows:

"In sum it is beyond dispute that there is a general, indeed universal, custom of federal law violation. Now this is a distressing situation, made not less so that in the eyes of many worthy citizens it is required by the asserted exigencies of successful law administration. But it is not an unusual situation. For actually it is a clash between federal and state governmental policies. As such it is a recurring struggle in our history and quite possibly a necessary one to a federal form of government. In the past we have found ways of meeting and solving the problem. Of course there are several forms of remedy; but the one to which there seems continual return when other remedies fail is the resort to the equity powers of the federal courts to enjoin repeated violations of the criminal law. This is an old and well established ground of equity jurisdiction, naturally to be resorted to only reluctantly as against state officials, but nevertheless thoroughly recognized. Thus the authority of United States courts to enjoin state officials, including prosecutor and others, from repeated violations of overriding federal laws has long been upheld in a variety of circumstances such as alien land ownership, rate regulation, closed shop and railroad tariff laws, and the like. Thus, for example, see *American Federation of Labor* v. *Watson*, 327 U. S. 582; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 147 A. L. R. 674; *Watson* v. *Buck*, 313

U. S. 387; *Hague* v. *C. I. O.*, 307 U. S. 496; *Sterling* v. *Constantin*, 287 U. S. 378; *Terrace* v. *Thompson*, 263 U. S. 197; *Ex parte Young*, 209 U. S. 123; *Smyth* v. *Ames*, 169 U. S. 466, modified 171 U. S. 361. And see also *Rea* v. *United States*, 350 U. S. 214, upholding an injunction preventing a federal agent from transferring federally suppressed evidence to a state court or there testifying.

Directly in point also and perhaps most persuasive of all in view of the close analogy are the modern segregation cases. Thus see *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, 38 A. L. R. 2d 1180, 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1; *Harrison* v. *National Ass'n for the Advancement of Colored People*, 360 U. S. 167, 179; *Faubus* v. *United States*, 8 Cir., 254 F. 2d 797, certiorari denied, 358 U. S. 829; *Clemons* v. *Board of Ed. of Hillsboro, Ohio*, 6 Cir., 228 F. 2d 853, certiorari denied *Board of Ed. of Hillsboro, Ohio* v. *Clemons*, 350 U. S. 1006. As these cases all demonstrate, a suit against a state officer violating federal law is not within the prohibition of actions against a state. See also Judge Parker's complete statement in *School Bd. of City of Charlottesville, Va.* v. *Allen*, 4 Cir., 240 F. 2d 59, certiorari denied 353 U. S. 910.

All these questions of jurisdiction the majority herewith concedes, including the irreparable injury sustained. I agree thoroughly with the principles here stated; but that leaves only *Stefanelli* v. *Minard*, 342 U. S. 117, and the question of the niceties of the exercise of federal equity jurisdiction left to give us pause. For *Stefanelli* recognizes the jurisdiction of equity and emphasizes only the restraint which the federal court should show against interfering with state criminal processes. I agree wholeheartedly, but ask (as was asked with respect to

Little Rock schools, martial law in the Texas oil fields, and other historic federal-state clashes). When does enough of federal law violation become too much? The facts rehearsed above demonstrate in my opinion that only by the course of federal injunction will the present impasse be resolved. *Schwartz* v. *Texas*, 344 U. S. 199, shows that the way is not by appeal from a conviction already had; indeed it confirms the view that this is the one healthy and direct and complete solution. A clean excision is better than continuous mangling. Involved in *Stefanelli* was an *isolated* case of federal law violation, not a consistent pattern as here. Also to be noted is the less direct compulsion of the federal law there, since the Fourth Amendment does not touch the problem of communication and evidence directly; no federal crime was there involved; and the damage had already been done. Carefully considered I regard *Stefanelli* as authority showing the need and the utility of the action I urge, rather than to the contrary.

Consequently I am persuaded by and would follow the good opinion of Judge Medina upon the grant of a stay in this case. *Pugach* v. *Dollinger*, 2 Cir., Feb. 11, 1960. I also note that two state justices have reached a like conclusion and decline to proceed further in wire tapping. *Matter of Interception of Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84, Hofstadter, J.; *Application for an Order Permitting the Interception of Telephone Communications of Anonymous*, 207 Misc. 69, 136 N. Y. S. 2d 612, Hofstadter, J.; *Application for Order Permitting Interception of Telephone Communications*, 28 U. S. L. Week 2446 (N. Y. Ct. Gen Sess., N. Y. C., March 7, 1960), Davidson, J. These cases not only illustrate the uncertain and anomalous position into which state judges are now thrust, but

> also are good examples to United States judges. In the first case cited here, Mr. Justice Hofstadter makes a very pointed allusion to the mandate of the United States Constitution that laws made pursuant to it are 'the Supreme Law of the Land,' binding upon us all, 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'' U. S. Const. Art. VI, cl 2. This reminder from a distinguished state brother of the necessity for obedience to the 'Supreme Law' ought to go far to allay the fear expressed that the state officials will defy this law, even after it has been authoritatively defined in the course of this litigation, and that the federal courts will be flooded with actions to curb this defiance. For my part I entertain no such fear of either the defiance or the flood of cases; and hence I forego comment on the implication that mere number of applications may bar the right to equity relief. On the contrary I venture to believe that our state brothers and colleagues in law enforcement, both on the bench and in the prosecuting offices, will welcome definitive resolution of the present hopeless stalemate and will hasten to comply with the requirements of law as soon as they are made clear.''

The uncertainty and confusion that exists in the New York State Judiciary on this question, is manifested when an eminent Jurist of the Court of General Sessions, New York County, Davidson, *J.*, despite the ruling of the New York Court of Appeals, in the case of *People* v. *Variano*, 1959, 5 N. Y. 2d 391, and *People* v. *Broady*, 1959, 5 N. Y. 2d 500, on March 7th, 1960, refused to sign an order to permit a wiretap, in the matter of the "*Application for Order Permitting Interception of Telephone Communications*," 28 U. S. L. Week 2446.

Judge Davidson, in his opinion, stated:

> "Lawlessness by the police and the district attorney, who are sworn to uphold and enforce the law will not aid in the enforcement of the criminal law, nor will it heighten the respect of our citizens for our law."

In *Nardone* v. *U. S.*, 302, U. S. 379, at page 383, the Court stated as follows:

> "The answer to the question is one of *policy*. Congress may have though it less important that some offenders should go unwhipped of justice than that the officers should resort to methods *inconsistent with ethical standards and destructive of personal liberty.*" (Italics ours)

From the above it is apparent that Congress set forth *ethical standards* for the *whole* people of the United States, including the people of the State of New York. There are no exceptions.

In the second *Nardone* case, *Nardone* v. *U. S.*, 308, U. S. 338, at page 341, the Supreme Court stated as follows:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that merely the evidence shall not be used before the Court, but that it shall *not be used at all.* (Italics ours)
>
> A decent respect for the policy of Congress must save us from imputing to it a *self defeating, if not disingenuous purpose.*" (Italics ours)

This language cannot be misinterpreted. Congress in passing Sec. 605 of the Federal Communications Act did not intend to pass a law that was *self defeating.* To permit the

State of New York, or any other state, under the guise of evidentiary rules to violate this law with impunity would amount to nullification or destruction of the "ethical standards" established by Congress, as representatives of our Federal Government and all of its people.

The issue presented by this case is thus one of first impression and great importance. Concededly the use of wiretapping by state law enforcement officers is widespread. There is no way to determine the extent to which federal officers are making use of state wiretaps, but there is every reason to believe that such use is also widespread.

It is thus apparent that the issue here presents an important and far reaching question in the field of federal and state powers. The conflict must be resolved lest an Act of Congress, such as Sec. 605 of the Federal Communications Act, be nullified and invalidated by the non-enforcement by the executive branch of the Federal Government, and the continuous and willful violation by the states.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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May, 1960

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 306-307—October Term, 1959.

(Argued March 8, 1960 Decided April 14, 1960.)

Docket Nos. 26116-26147

BURTON N. PUGACH,

Petitioner-Appellant,

—v.—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Resondent-Appellees.

Before:

LUMBARD, *Chief Judge,*

CLARK, WATERMAN, MOORE and FRIENDLY, *Circuit Judges.*

Plaintiffs appeal from judgments rendered by the United States District Courts for the Southern and Eastern Districts of New York, Frederick vanPelt Bryan, *J.*, and Leo F. Rayfiel, *J.*, respectively, in two suits denying preliminary injunctions in actions seeking to prohibit state officers from divulging in state criminal trials evidence obtained by them

through the tapping of plaintiffs' telephone wires on the ground that introduction of such evidence would constitute a violation of §605 of the Communications Act of 1934, 47 U. S. C. §605. Judgments affirmed.

HERBERT S. SIEGAL, New York, N. Y., *for appellant Burton N. Pugach.*

EMANUEL REDFIELD, New York, N. Y., for the New York Civil Liberties Union, *amicus curiae.*

IRVING ANOLIK, Assistant District Attorney, Bronx County (Isidore Dollinger, District Attorney and Walter E. Dillon, Assistant District Attorney, Bronx County, on the brief), *for appellees Isidore Dollinger and Stephen P. Kennedy.*

LOUIS J. LEFKOWITZ, Attorney General, State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, George K. Bernstein, Assistant Attorney General and Vincent A. Marsicano, Assistant Attorney General, *amicus curiae.*

Appendix A

LUMBARD, *Chief Judge*:

The question for decision is whether a federal court should enjoin state officers from divulging wiretap evidence in a state criminal trial, when introduction of this evidence will constitute the violation of a federal criminal statute. In the two cases before us Judges Bryan and Rayfiel both refused to grant injunctive relief, and we affirm their judgments.

In No. 306, *Pugach* v. *Dollinger*, appellant and several others were indicted in November 1959 by the State of New York for burglary in the second degree, maiming, assault in the second degree and conspiracy. Their case was set for trial on January 7, 1960. About two weeks before the trial was to begin appellant brought this suit in the Southern District of New York to enjoin the Bronx County District Attorney, the New York City Police Commissioner and their agents from making use at the state trial of evidence obtained by tapping appellant's telephone wires in June 1959 and of evidence obtained by the use of information overheard in the course of the tapping. The complaint alleged that, although the wiretap was obtained pursuant to state court authorization and in accordance with a statute, its divulgence would constitute a violation of §605 of the Communications Act of 1934, 47 U. S. C. §605. It further stated that wiretap evidence had been introduced before the grand jury in obtaining appellant's indictment and that the district attorney intended to make use of such evidence at trial. The district attorney has not denied that he expects to use wiretap evidence, nor does he contest appellant's allegations that appellant will be subject to irreparable injury if convicted by means of such evi-

dence. Judge Bryan, relying primarily upon *Stefanelli* v. *Minard*, 342 U. S. 117 (1951) declined to grant a preliminary injunction and dismissed the complaint. *Pugach* v. *Sullivan*, 180 F. Supp. 66 (S. D. N. Y. 1960). Upon motion by appellant, this court stayed introduction of the wiretap evidence, pending determination of the appeal.[1]

In No. 307, *O'Rourke* v. *Levine*, appellants are presently on trial in the Nassau County Court on an indictment charging them with conspiracy, extortion, attempted extortion and coercion. The selection of jurors began on February 1, 1960 and the taking of testimony started a week later. Suit in the Eastern District of New York to enjoin the introduction of wiretap evidence was commenced on February 16, 1960. The allegations of the appellants' bill are substantially the same as those in the *Pugach* case, though in *O'Rourke* the district attorney has stated on the record in the state court trial his intention to make use of wiretap evidence. Judge Rayfiel denied a preliminary injunction, distinguishing the grant of the stay pending appeal in Pugach on the ground that much greater disruption of the state court proceeding would result were the introduction of evidence in a trial already in progress enjoined. Both this court and subsequently Mr. Justice Harlan of the Supreme Court declined to stay the introduction of the wiretap evidence pending appeal.

We convened an *en banc* session of the court to hear these appeals.

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[1] 2 Cir., Feb. 11, 1960, Slipsheet p. 731. There were three opinions. Judge Medina voted to grant the stay on grounds that would lead equally to the grant of an injunction. Judge Waterman concurred in the grant solely to preserve the status quo lest the case become moot before the appeal could be decided. Judge Madden of the Court of Claims, sitting with the Court by designation, dissented.

Appendix A

The jurisdiction of the district courts was properly founded upon §1337 of the Judicial Code, which states that "the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * * " The Communications Act of 1934 is an "Act of Congress regulating commerce." See *Benanti* v. *United States*, 355 U. S. 96, 104-05 (1957); cf. *Mulford* v. *Smith*, 307 U. S. 38, 46 (1939). Since the asserted right to relief is based upon §605 of the Communications Act, a suit to protect the federal right against impairment by state officers is a suit "arising under" the federal statute. *A. F. of L* v. *Watson*, 327 U. S. 582, 590-91 (1946).[2]

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[2] Whether jurisdiction may also lie under 28 U. S. C. §1343(3) we do not decide.

Section 1343 provides in part:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege of immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States * * * "

In *McGuire* v. *Amrein*, 101 F. Supp. 414 (D. Md. 1951), the court held that it did not have jurisdiction of a suit identical in nature to that here under §1343(3), since §605 is not an "Act of Congress providing for equal rights of citizens" as that phrase is used in §1343(3). In *Stefanelli* v. *Minard*, 342 U. S. 117 (1951), the Supreme Court reserved the question whether jurisdiction lay under §1343(3) in a suit to enjoin the introduction of evidence in a state trial on the ground that the evidence was obtained by means of an unlawful search and seizure.

Appendix A

Section 605 of the Communications Act states in pertinent part: " • • • no person not being authorized by the sender shall intercept any communication and divulge the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person • • • " In *Nardone* v. *United States*, 302 U. S. 379 (1937) and 308 U. S. 338 (1939), the Supreme Court held that under §605 evidence obtained from wiretapping by federal officers was inadmissible in a federal court. In *Schwartz* v. *Texas*, 344 U. S. 199 (1952), upon direct review of a state criminal conviction it was held that the use of the same kind of evidence obtained by state officers was not prohibited by §605. The Court stated that it would not presume, in the absence of any clear manifestation of intent, that Congress intended to supersede a state rule of evidence permitting the introduction of evidence obtained by state officers and divulged in violation of a federal statute. Two years ago, in *Benanti* v *United States*, *supra*, the Court held that wiretap evidence obtained by state officers was not admissible in a federal court, although the evidence was procured in accordance with a New York state statute authorizing wiretapping pursuant to court order.[3] The Court reasoned

---

[3] Section 813-a of the New York Code of Criminal Procedure, under which the wiretap orders were issued in *Benanti* and in the cases before us states in part:

> "An ex parte order for the interception, overhearing or recording of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the County of New York upon oath or affirmation of a district attorney, or of the attorney-general or of any officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and iden-

that under §605 Congress intended to exclude from use in the federal courts evidence the divulgence of which would be unlawful, regardless of its source. Though the Court made clear that tapping coupled with divulgence was a violation of §605, even when done pursuant to state law, it carefully distinguished the decision in *Schwartz* v. *Texas*, *supra*.[4]

Appellants contend that we should enjoin the defendants from introducing wiretap evidence in the state court trials, since the divulgence of this evidence will violate §605. They contend that if we do not intervene, they will be subject to irreparable injury, because, if the evidence is introduced

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tifying the particular telephone number or telegraph line, and particularly describing the person or persons whose communications are to be intercepted, overheard or recorded and the purpose thereof. * * * Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. * * *"

Section 813-a was originally enacted in 1942 pursuant to Art. 1, §12, para. 2 of the New York Constitution, adopted in 1938, which states:

> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

[4] Whether both a tapping and a divulgence are necessary for a violation of §605 was specifically reserved by the Supreme Court in *Benanti*. See 355 U. S. at 100 n. 5. Since both elements are involved here, we need not consider whether tapping alone is lawful

and they are found guilty their convictions will not be subject to reversal on appeal either under New York law, see *People* v. *Variano*, 5 N. Y. 2d 391, 185 N. Y. S. 2d 1 (1959), or federal law, *Schwartz* v. *Texas, supra.*

The exercise of the power of a federal court to grant equitable relief is a matter of discretion. In each case the court must balance the factors for and against the use of its power. See *Douglas* v. *City of Jeanette*, 319 U. S. 157 (1943). Here we think that the district courts properly concluded that the balance weighs against the exercise of the power to grant injunctive relief. We agree that in the circumstances of these two cases a federal court should not intervene in criminal prosecution by a state for violation of its criminal laws. See *Voci* v. *Storb*, 235 F. 2d 48 (3 Cir. 1956).

Both Congress and the Supreme Court have often indicated their concern for the preservation of the balance between the states' administration of their laws and the use of federal equity power by restriction or withholding of the power of the federal courts. See, e.g., 28 U. S. C. §§1342, 2283; *Stefanelli* v. *Minard, supra; Watson* v. *Buck*, 313 U. S. 387 (1941); *Maryland* v. *Soper*, 270 U. S. 9, 270 U. S. 36, and 270 U. S. 44 (1926). Moreover, Congress, in §501 of the Communications Act, has provided that violation of §605 shall be a misdemeanor,[5] and we have held that §605 creates a civil action for damages in favor of one whose line is tapped. *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (2 Cir. 1947). Finally, we cannot overlook the long

[5] Convictions have been upheld under §501 for violation of §605. E.g., *United States* v. *Gris*, 247 F. 2d 860 (2 Cir. 1957).

recognized principle of equity, based upon the policy of preserving the right to jury trial, that a court should not enjoin the commission of a crime. With these factors in mind, we do not think that a federal court should interfere with the prosecution of a state criminal proceeding in order to provide an additional means of vindicating any private rights created by §605.

We are guided in our determination by the decision of the Supreme Court in *Stefanelli* v. *Minard, supra.* There the Court held that a federal court should refuse to intervene in a state criminal proceeding to enjoin the use of evidence claimed to have been secured by an unlawful search and seizure contrary to the Fourth Amendment. The plaintiff's claim in *Stefanelli* was closely analogous to that made here—that since under *Wolf* v. *Colorado,* 338 U. S. 25 (1949), admission in a state court of evidence obtained by an unlawful search and seizure would not be ground for reversal of the conviction, a federal court should enjoin the introduction of such evidence. Mr. Justice Frankfurter's statement of the reasons for refusing injunctive relief in *Stefanelli* are equally applicable here:

> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law —with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted uncon-

stitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution." (Footnotes omitted) 342 U. S. at 123-24.

It is urged that *Stefanelli* differs from the cases before us in that there the violation of federal law was the unlawful search itself, which had already taken place at the time of the suit for injunctive relief and which the federal court could therefore not prevent, while here the very act of divulging the evidence will constitute the commission of a federal crime. The distinction is not persuasive. The decision in *Stefanelli* was placed on no such narrow ground, but was the expression of a general policy against "piecemeal" intervention by the federal courts in state proceedings for the purpose of litigating collateral issues. Moreover, the fact that the divulgence of the evidence sought to be enjoined will constitute the commission of a crime is not significant, since the plaintiffs must prevail, if at all, by vindication of their own rights under §605, not by collateral enforcement of the rights of the United States to prosecute under §501. As the Supreme Court said in *Schwartz* v. *Texas, supra,* at page 201, "the introduction of the intercepted communications would itself be a violation of the statute" is "simply an additional factor for the state to consider in formulating a rule of evidence for use

in its own courts. Enforcement of the statutory prohibition in §605 can be achieved under the penal provision of §501."

Neither do we find it a persuasive ground of distinction that *Stefanelli* was an isolated case of federal law violation in New Jersey rather than what is called a consistent pattern in New York. Indeed, it could be argued that the constant conflicts that would be engendered between federal and state courts in an effort to deal with such a pattern would make this an *a fortiori case* for refusal to interfere. We have no reason to think that issuance of injunctions in these two cases would lead New York prosecutors to desist from this time forward from offering wiretap evidence in New York courts as permitted by the law of that state. On the contrary, the district courts would be flooded with suits for injunctions against the use of wiretap evidence and its alleged fruits in the state courts, with the consequent necessity of determining just what evidence was proposed to be introduced and whether the trial had reached such a stage that vindication of the federal right should be subordinated to practical considerations of state law enforcement; and all these determinations would be subject to appeal, with the prosecution obstructed in the meanwhile. Our respect for the supremacy clause is deep and abiding. But, as recognized in *Stefanelli* v. *Minard*, direct interference by federal courts in state criminal trials is quite a different matter from the analogies suggested by our brother Clark.

The stay granted by this court in *Pugach* v. *Dollinger* is vacated. The judgments are affirmed.

WATERMAN, *Circuit Judge*, concurring:

I concur in the result reached in both cases by the majority of the court; but I believe I should separately state certain individual views.

The injunction sought by petitioners in *O'Rourke et al.* v. *Levine* must be denied. A jury had been impaneled, trial had already begun, and some testimony had already been adduced, when the district court was importuned to affect future trial developments by an injunction order which, if granted, might limit the People's further proof. The disruptive complications that ensue when federal judicial power is exercised to interfere with a state court criminal trial after testimony has been received there clearly dictate that we affirm the action below. A proper respect for the relation of the United States to the States and the Courts of the States, under these circumstances permits, in my belief, no other result. If at trial it appears that Section 605 of the Federal Communications Act is violated by an unauthorized divulgence by a witness under oath of an intercepted communication the United States can enforce that violation against the witness by prosecuting him under §501 of that Act. In fact, as I read the opinion of the Chief Justice speaking for a unanimous court in *Benanti* v. *United States*, 355 U. S. 96, at 103-106, even thought the interception was authorized by a New York state wiretap order, the divulgence would be such a clear violation of the Federal Communications Act that federal prosecuting officers would be expected to so prosecute.

Though I also concur in the result the majority reaches in *Pugach* v. *Dollinger and Kennedy*, the problems pre-

sented to us in that situation are much more difficult to resolve. There trial is not under way, and an injunction issued by us in the exercise of our equity powers to preserve compliance with "the Supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," will not disrupt a trial or create any confusion. Forbidding the introduction of wiretap testimony at a trial not yet begun would only serve to prevent counsel from introducing certain material; it would neither stay the criminal prosecution itself, nor embarrass the progress of a trial, nor require a mid-trial shift of strategy. And though New York, as well as the two other states in our Circuit, does not inquire how offered evidence was obtained, the quashing of wiretap evidence in advance of trial would not appear to be an unwarranted intrusion by us into State affairs inasmuch as the federal government has a very special interest in this field, an interest set forth by Congress in the Federal Communications Act with such thoroughness as to preempt the states from regulation save for certain stated exceptions not here applicable. *Benanti* v. *United States*, 355 U. S. 96, 103-106 (1957).

I receive the impression from reading the majority opinion that the majority, although having a deep and abiding respect for the supremacy clause, do not think that a federal court should ever interfere with the prosecution of a state criminal proceeding.

To such doctrine I cannot subscribe.

In order to preserve as best can be the pluralism of our form of government it is true that in the exercise of a proper judicial self-restraint we should ever hesitate to interfere with state criminal proceedings—even as here,

where it is claimed that unless we do interfere there will be open and overt violations of an Act of Congress.

But it is also true that though, as a general policy, we should refuse to act, there are "exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent • • • " Chief Justice Stone speaking for the Court in *Douglas* v. *City of Jeannette*, 319 U. S. 157 at 163.

Pugach v. *Dollinger* is an exceptional case, and it may well be that Judge Clark and Judge Medina are soundest in their approach to the problems it poses. I have hesitated to agree with them only because I have faith that there is no clear irreparable injury to Pugach at this time. I assume, *arguendo*, that divulgence of information obtained by wiretap at his Bronx County trial will do Pugach irreparable injury; but I am not willing also to assume that a New York state trial judge will permit such evidence to be admitted over the objection of defense counsel. After all, New York state judges, as we, were bound when they took office, to support the Constitution of the United States; and they are fully cognizant of Article VI, Clause 2 thereof:

> "2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Schwartz v. *Texas*, 344 U. S. 199 (1952), and *Benanti* v. *United States*, *supra*, make clear, and all the opinions of the court in the present case recognize, that divulgence of

the contents of a wiretap unless the divulgence is authorized by the sender will constitute a violation of Sections 605 and 501. It is therefore presumptuous to assume that any New York State trial judge will acquiesce to the commission of a crime against the United States in his presence in his courtroom by a witness testifying under oath.

Though I hope I have made myself clear that I expect that no evidence of intercepted communications will be admitted at trial and that it is principally because of this belief that I concur in the result reached by the majority, nevertheless if I believed otherwise I might still refuse to issue an injunction under the doctrine of *Douglas* v. *City of Jeannette*, *supra*. If the offered evidence is admitted, despite *Benanti*, *supra*, and if Pugach is convicted and his conviction is affirmed by the New York Court of Appeals—see *People* v. *Dinan*, 6 N. Y. 2d 715, 185 N. Y. S. 2d 806 (1959), *cert. denied*, 361 U. S. 839; *People* v. *Variano*, 5 N. Y. 2d 391, 185 N. Y. S. 2d 1 (1959)—even then that conviction is subject to review by the Supreme Court. This possibility of a final federal review of a federal question is perhaps enough so that under *Douglas* v. *City of Jeannette*, *supra*, Pugach may have an adequate remedy at law; and an injunction ought not to issue.

Where a state persistently sanctions violation of federal law, due process considerations may arise, see Judge Medina's concurring opinion in *United States ex rel. Graziano* v. *McMann*, 2 Cir. Feb. 11, 1960. As I indicated in my majority opinion in *Graziano*, I am unpersuaded for I believe *Schwartz* v. *Texas* to be controlling. But my opinion in that case is hardly the final one, and since Judge Medina's position is well-reasoned, it affords plaintiff some-

thing more than a faint prospect that his expected state conviction will be reviewable by the Supreme Court on certiorari. The precise question has never been decided, and in light of the dicta in *Salsburg* v. *Maryland*, 346 U. S. 545 (1954) and *Wolf* v. *Colorado*, 338 U. S. 25 (1948), the possibility of direct review is strong enough to justify my concurrence in the result reached by the majority. Nor should we overlook the possibility that the Supreme Court might grant certiorari to reconsider *Schwartz* v. *Texas*.

Furthermore, I should point out that I not only differ from the majority wherein they apparently suggest that a federal court should never interfere with a state criminal prosecution, but I also differ from them wherein they rely for their result upon the doctrine expressed in *Stefanelli* v. *Minard*, 342 U. S. 117 (1951). Without in the least detracting from the force of that opinion it is my belief that that case and its doctrine are alike inapplicable here. In *Stefanelli* whatever federal crime was present had been fully committed before the federal court was importuned to interfere with the State court proceedings. Here the threatened commission of federal crime is sought to be prevented by an application for relief to a federal court in advance of the occurrence. In the unlikely event a person were officially advised that his home was to be illegally searched by state officers on a particular date, I would suppose he could readily obtain injunctive relief from a federal court. It would be in this posture of affairs that the two situations would be similar.

One final point needs to be made. Normally it is not the province of a member of the federal judiciary to suggest to a United States District Attorney how he should perform his duties.

Appendix A

I point out that in oral argument before this court sitting *in banc* counsel for the Pugach respondent-appellees did not deny that it was planned to offer wiretap evidence at that trial, and thereby did not deny to five federal judges in open court an intent to commit a federal crime. If such a crime is committed and remains unprosecuted after it has been stated by the U. S. Supreme Court in *Schwartz* v. *Texas*, *supra*, at page 201, and by us here that the interests of the United States may be adequately protected through enforcement of the penal provisions of Section 501, there will have been a most extraordinary affront to this court. Accordingly I ask that the United States District Attorney for the Southern District of New York follow the proceedings in *People* v. *Pugach* with the closest attention. Similarly, I invite the attention of the United States District Attorney for the Eastern District of New York to the proceedings in *People* v. *O'Rourke, etc.*

CLARK, *Circuit Judge* (dissenting):

In its latest pronouncement upon the issue, the Supreme Court of the United States has refused to find exception for state officers from the sweeping federal ban on unauthorized interception and divulgence of "any communications," contained in §605 of the Federal Communications Act, 47 U. S. C. §605. Speaking through the Chief Justice of the United States, a unanimous Court finds "that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy." And it points out the failure of Congress

to grant exceptions, though strongly importuned to do so. *Benanti* v. *United States*, 355 U. S. 96, 105, 106.

Notwithstanding its decisive character, there is nothing surprising in the Court's statement; indeed, it would have been surprising had the Court said less. For the absolute character of the prohibition has been steadily emphasized over the years and the attempt to make the statute say less than it does has been conspicuously unsuccessful. So we must accept the interpretation that wire tapping, whether by state officers or by anyone else, is simply and shortly forbidden by federal law, subject to severe penalties of fine and imprisonment. 47 U. S. C. §501. Attack must therefore be limited to the need of new legislation because of its hampering effects on law enforcement if prosecuting officials cannot have the benefit of at least "controlled" wire tapping. Involved are surely weighty arguments of public policy which the legislative body should weigh.[1] But these arguments have not as yet prevailed with the only governmental agency having authority to act to modify the existing law, and I do not see how they can affect the responsibility of United States judges to enforce that law. Hence for us I see no escape but to start with the premise that we are faced with repeated open and acknowledged violations of federal law which we are assured will be continued until and unless federal authorities intervene.

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[1] That the legislative is the correct and indeed the only approach to a solution is the tenor of a discriminating article by the Chairman of the New York Joint Legislative Committee to Study Illegal Interception of Communications. Savarese, *Eavesdropping and the Law*, 46 A. B. A. J. 263 (1960). See also Gerhart, *Let's Take the Hypocrisy Out of Wiretapping*, 30 N. Y. St. B. Bull. 268 (1958); Williams, *Wiretapping Should Be Liberalized*, 30 N. Y. St. B. Bull. 261 (1958).

Thus we have an absolute impasse going so far as to be almost ludicrous if the issue were not so fundamentally serious. It seems generally conceded that wire tapping is an evil thing, particularly when employed by criminal or underworld characters and their associates. Yet it has not been possible to enforce the law against such persons when at the same time it is not enforced against even more open violators, albeit with loftier motives.[2] Thus one restrained comment puts it mildly: "Weighing the individual's right to privacy against the need for effective detection of criminals, we are met with the kind of conflict of values which characterizes many areas of our law and our social organization. In the case of wire tapping, however, this competition of social interests has resulted in a dangerous stalemate—a failure to find a workable adjustment—which leaves Mr. Smith, the average citizen, at the mercy of the more ruthless in our population. For, despit the statutes and judicial decisions which purport to regulate wire tapping, today this practice flourishes as a wide-open operation at the federal, state, municipal, and private levels." Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 Col. L. Rev. 165, 167 (1952).

Professor Westin goes on to point out (from a careful analysis of congressional hearings and other cited material) how this "stalemate" affects the lives and fortunes of ordinary citizens, as well as others, and how the criticized practice taps the conversation of public officials in every sort of government agency, of business men in business organiza-

[2] There appears to have been only one successful prosecution under the statute. *United States* v. *Gris*, 2 Cir., 247 F. 2d 860. James R. Hoffa was prosecuted and acquitted. See Savarese, *supra* note 1, at 266.

tions, of private persons for purposes as diverse as labor espionage or securing evidence of a wife's infidelity, and with schools or training centers for instructing telephone tappers.[3] More recently a detailed study sponsored by the Pennsylvania Bar Association Endowment shows much of wire tapping in action, with a description of "The Tools" and with detailed investigation particularly of police activities in several important metropolitan areas, including New York. See Dash, Schwartz and Knowlton, The Eavesdroppers 35 *et seq.* (1959). This suggests a much more prevalent practice than many officials have been willing to admit, although even the conceded number of ex parte court orders issued under the New York statutes appears quite adequate to show the pattern.[4] And other material of like effect is extensively available.[25]

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[3] 52 Col. L. Rev. 165, 167, 168 (1952), quoted by Professor Donnelly of Yale in his careful article, *Comments and Caveats on the Wire Tapping Controversy*, 63 Yale L. J. 799 (1954).

[4] In *Wiretapping in New York*, 31 N. Y. U. L. Rev. 197 (1956), the figures for the orders received by the telephone company in New York City are given, viz., 1135 orders (good for 90 days) affecting 1954 wires for the year 1954 and 1013 orders affecting 1662 wires for the year 1953. The defendants take exception to the figures given by Mr. Justice Douglas, An Almanac of Liberty 355 (1954), but quote approvingly those given by Brown and Peer, *The Wiretapping Entanglement; How to Strengthen Law Enforcement and Preserve Privacy*, 44 Cornell L. Q. 175, 183 (1959), as being a total of 480 orders in New York City in 1952. In Dash, Schwartz and Knowlton, The Eavesdroppers 39 *et seq.*, 68, 69 (1959), the authors suggest that Mr. Justice Douglas' estimate properly refers to wire taps, not orders, and then, making their own estimate of from 16,000 to 29,000 wire taps a year, also suggest that the Justice's estimate is thus "closer to the truth than the figures submitted by the police to the Kings County prosecutor." More lately Mr. Dash has given an estimate of from 13,000

Appendix A

In sum it is beyond dispute that there is a general, indeed universal, custom of federal law violation. Now this is a distressing situation, made not less so that in the eyes of many worthy citizens it is required by the asserted exigencies of successful law administration. But it is not an unusual situation. For actually it is a clash between federal and state governmental policies. As such it is a recurring struggle in our history and quite possibly a necessary one to a federal form of government.[6] In the past we have found ways of meeting and solving the problem. Of course, there are several forms of remedy; but the one to which

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to 20,000 wire taps per year. Hearing before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U. S. Senate, 86th Cong., 1st Sess., pursuant to S. Res. 62, Pt. 3, Wiretapping, Eavesdropping, and the Bill of Rights, 520-521 (1960).

[5] Earlier citations are given by Professor Donnelly, in the article cited in note 3 *supra*. Later references appear in 57 Col. L. Rev. 1159 (1957); 26 Ford. L. Rev. 540 (1957); 31 N. Y. U. L. Rev. 197 (1956); 67 Yale L. J. 932 (1958); and Dash, Schwartz and Knowlton, The Eavesdroppers 443, 458 *et seq.* (1959), including also references to Congressional and New York state legislative hearings. See also the statements and articles by law professors and others in the Hearing cited *supra* note 4, at 566-714.

[6] See Demet, *A Trilogy of Massive Resistance*, 46 A. B. A. J. 294, 296 (1960):

> "As demonstrated, disobedience, disrespect and massive resistance to the mandates of the United States Supreme Court are relatively old historical concepts practiced by various of the Soverign States of the Union when it was felt the Court trespassed into spheres in which the various states had ideological and sociological views contrary to the edicts and mandates of the Court.
>
> "It is interesting to speculate what the state courts would have done if the segregation cases had reached the Supreme Court by way of state courts and not the federal courts."

there seems continual return when other remedies fail is the resort to the equity powers of the federal courts to enjoin repeated violations of the criminal law. This is an old and well established ground of equity jurisdiction, naturally to be resorted to only reluctantly as against state officials, but nevertheless thoroughly recognized. Thus the authority of United States courts to enjoin state officials, including prosecutors and others, from repeated violations of overriding federal law has long been upheld in a variety of circumstances such as alien land ownership, rate regulation, closed shop and railroad tariff laws, and the like. Thus, for example, see *American Federation of Labor* v. *Watson*, 327 U. S. 582; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 147 A. L. R. 674; *Watson* v. *Buck*, 313 U. S. 387; *Hague* v. *C. I. O.*, 307 U. S. 496; *Sterling* v. *Constantin*, 287 U. S. 378; *Terrace* v. *Thompson*, 263 U. S. 197; *Ex parte Young*, 209 U. S. 123; *Smyth* v. *Ames*, 169 U. S. 466, modified 171 U. S. 361. And see also *Rea* v. *United States*, 350 U. S. 214, upholding an injunction preventing a federal agent from transferring federally suppressed evidence to a state court or there testifying.

Directly in point also and perhaps most persuasive of all in view of the close analogy are the modern segregation cases. Thus see *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, 38 A. L. R. 2d 1180, 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1; *Harrison* v. *National Ass'n for the Advancement of Colored People*, 360 U. S. 167, 179; *Faubus* v. *United States*, 8 Cir., 254 F. 2d 797, certiorari denied 358 U. S. 829; *Clemons* v. *Board of Ed. of Hillsboro, Ohio*, 6 Cir., 228 F. 2d 853, certiorari denied *Board of Ed. of*

Hillsboro, Ohio v. *Clemons*, 350 U. S. 1006. As these cases all demonstrate, a suit against a state officer violating federal law is not within the prohibition of actions against a state. See also Judge Parker's complete statement in *School Bd. of City of Charlottesville, Va.* v. *Allen*, 4 Cir., 240 F. 2d 59, certiorari denied 353 U. S. 910.

All these questions of jurisdiction the majority opinion herewith concedes, including the irreparable injury sustained. I agree thoroughly with the principles here stated; but that leaves only *Stefanelli* v. *Minard*, 342 U. S. 117, and the question of the niceties of the exercise of federal equity jurisdiction left to give us pause. For *Stefanelli* recognizes the jurisdiction of equity and emphasizes only the restraint which the federal court should show against interfering with state criminal processes. I agree wholeheartedly, but ask (as was asked with respect to Little Rock schools, martial law in the Texas oil fields, and other historic federal-state clashes), When does enough of federal law violation become too much? The facts rehearsed above demonstrate in my opinion that only by the course of federal injunction will the present impasse be resolved. *Schwartz* v. *Texas*, 344 U. S. 199, shows that the way is not by appeal from a conviction already had; indeed it confirms the view that this is the one healthy and direct and complete solution. A clean excision is better than continuous mangling. Involved in *Stefanelli* was an isolated case of federal law violation, not a consistent pattern as here. Also to be noted is the less direct compulsion of the federal law there, since the Fourth Amendment does not touch the problem of communication and evidence directly; no federal crime was

there involved; and the damage had already been done.[7] Carefully considered I regard *Stefanelli* as authority showing the need and the utility of the action I urge, rather than to the contrary.

Consequently I am persuaded by and would follow the good opinion of Judge Medina upon the grant of a stay in this case. *Pugach* v. *Dollinger*, 2 Cir., Feb. 11, 1960. I also note that two state justices have reached a like conclusion and decline to proceed further in wire tapping. *Matter of Interception of Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84, Hofstadter, *J.*; *Application for an Order Permitting the Interception of Telephone Communications of Anonymous*, 207 Misc. 69, 136 N. Y. S. 2d 612, Hofstadter, *J.*; *Application for Order Permitting Interception of Telephone Communications*, 28 U. S. L. Week 2446 (N. Y. Ct. Gen. Sess., N. Y. C., March 7, 1960), Davidson, *J.*[8] These cases not only illustrate the uncertain and anomalous position into which state judges are now thrust, but also are good examples to United States judges. In the first case cited here, Mr. Justice Hofstadter makes a very pointed allusion to the mandate of the United States Constitution

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[7] Hence for the exercise of a court's discretion there is a real difference between a completed case and one which is still pending, as we have held in *U. S. ex rel. Graziano* v. *McMann*, 2 Cir., Feb. 11, 1960. This difference might serve to distinguish the *O'Rourke* case here from that of *Pugach*. Thus, there is much more reason to refuse an injunction in *O'Rourke*. On the whole, however—except and unless the trial has proceeded further than was evident at our hearing—I do not believe the *O'Rourke* case has gone so far but that justice will be better served by the issuance of an injunction there also.

[8] So held also by Judge Rayfiel in *Burack* v. *State Liquor Authority of State of N. Y.*, D. C. E. D. N. Y., 160 F. Supp. 161.

that laws made pursuant to it are "the Supreme Law of the Land," binding upon us all, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const. Art. VI, cl. 2. This reminder from a distinguished state brother of the necessity for obedience to the "Supreme Law" ought to go far to allay the fear expressed that the state officials will defy this law, even after it has been authoritatively defined in the course of this litigation, and that the federal courts will be flooded with actions to curb this defiance. For my part I entertain no such fear of either the defiance or the flood of cases; and hence I forego comment on the implication that mere number of applications may bar the right to equity relief. On the contrary I venture to believe that our state brothers and colleagues in law enforcement, both on the bench and in the prosecuting offices, will welcome definitive resolution of the present hopeless stalemate and will hasten to comply with the requirements of law as soon as they are made clear.

I would reverse the judgments below for the issuance of the injunctions sought.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1959.

(Motion argued February 1, 1960

Decided February 11, 1960.)

BURTON N. PUGACH,

Petitioner-Appellant,

—against—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County and
HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondent-Appellees.

Before:

MEDINA and WATERMAN, *Circuit Judges*, and MADDEN, *Judge*, United States Court of Claims.*

Motion by appellant for a stay.

HERBERT S. SIEGEL and LOUIS FUSCO, JR., Bronx, New York, *for petitioner-appellant.*

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* Sitting by designation pursuant to the Provisions of 28 U. S. C. §291(a).

Appendix B

IRVING ANOLIK, Assistant District Attorney, Bronx County, New York (Isidore Dollinger, District Attorney, Bronx County, and Alexander E. Scheer, Assistant District Attorney, Bronx, New York, on the brief), *for respondent-appellees.*

MEDINA, *Circuit Judge*:

Burton N. Pugach and others were indicted by the Grand Jury of Bronx County, New York, charged with the crimes of burglary in the second degree, maiming, assault in the second degree and conspiracy. Another indictment charges Pugach with felonious possession of firearms. Proceedings are pending in the County Court of Bronx County and we are informed by the Assistant District Attorney in charge that "it will not be possible to delay this case beyond February 15."

The present action was brought in the United States District Court for the Southern District of New York against the District Attorney of Bronx County and the Police Commissioner of New York City for a permanent injunction restraining the use by them and their agents and employees in the forthcoming trial of certain wiretap evidence. A motion for a preliminary injunction was denied and the complaint was dismissed. Pugach appealed to this Court from the order denying the preliminary injunction and dismissing his complaint. The matter comes before us on a motion for a stay pending the hearing of the appeal.

It is not disputed that defendants or their agents on June 15, 1959 procured an order of the Supreme Court of the

State of New York permitting Pugach's telephone wires to be tapped, that they were tapped and that the contents of the wiretaps were divulged to the Grand Jury. It is also asserted and not denied that the wiretaps were divulged "to the press and to other persons." We agree with the statement by the District Judge: "It appears highly likely that the prosecution will use such evidence against plaintiff on the trial of the indictments." Indeed, the position of the District Attorney on this motion is not that no wiretap evidence will be used on the trial but rather that the order permitting the wiretap was authorized by Article I, Section 12 of the New York Constitution, by Section 813a of the New York Code of Criminal Procedure, and the evidence thereof held to be admissible in criminal prosecutions by the recent decisions of the New York Court of Appeals in *People* v. *Variano*, 1959, 5 N. Y. 2d 391, and *People* v. *Broady*, 1959, 5 N. Y. 2d 500; and he further contends that a federal court not only should not interfere with the use of such wiretap evidence but is without power or jurisdiction to do so. Under these circumstances we see no reason to doubt that the wiretap evidence will be used at the trial unless we take action to prevent such use.

Pugach's argument is: that Section 605 of the Federal Communications Act makes it a federal crime to tap a telephone and "divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication"; that defendants or their agents are about to commit this federal crime by further divulging and offering the wiretaps in evidence at the trial; that the Supreme Court has in effect held in *United States* v. *Benanti*, 1957, 355 U. S. 96, that the constitutional and legis-

lative authorization of wiretaps by the State of New York is illegal and void; that if the evidence is received at the trial and Pugach is convicted he will be wholly without remedy, since under *Schwartz* v. *Texas*, 1952, 344 U. S. 199, which is still in effect, the evidence will be admissible under the New York rules of evidence, even though illegally obtained, and his conviction will not be reversed. He also claims that the result of such violations of federal law will deprive him of his liquor license and his license to practice law. Pugach argues that, unless we grant the injunctive relief he prays, defendants and their agents will go ahead and violate the federal statute with impunity, shielding themselves behind a constitutional and legislative scheme of the State of New York that has been held by the Supreme Court to be invalid. This is a powerful argument and we have been unable to find any satisfactory answer to it.

It is interesting to note that on the same day the motion now under consideration was argued we also heard argument in *United States ex rel. Graziano* v. *McMann*, another wiretapping case. The regular New York procedure had been followed, the wiretap evidence was received at the trial and Graziano was convicted. The judgment of conviction was affirmed by the Appellate Division, 1957, 3 A. D. 2d 1010, and by the Court of Appeals, 1958, 4 N. Y. 2d 881. A motion to amend the remittitur to note that a question arising under the federal Constitution had been argued and decided was denied, 1958, 4 N. Y. 2d 1046, although Graziano had objected to the wiretap evidence and claimed it should not have been received as it violated the federal statute against intercepting and divulging telephone messages, and the Supreme Court denied certiorari, 1958, 358

U. S. 851. Thereafter Graziano applied for habeas corpus in the United States District Court for the Northern District of New York on the ground that his conviction violated his right to due process of law under the Fourteenth Amendment and the writ was dismissed. It was the appeal from the order dismissing the writ in *Graziano* that was argued before us on the same day Pugach's motion was argued. This Court has affirmed the order dismissing the writ in *Graziano* in an opinion filed herewith. This gives point to what may happen to Pugach if this motion is denied. In other words, once the federal law against wiretapping has been violated by state enforcement officers testifying at the trial to the contents of the wiretap, and a conviction has been obtained by use of such proof, the only remedy may well be a criminal prosecution against the enforcement officers who have violated the law or perhaps a civil suit by the convicted defendant for damages. That such remedies are hopelessly inadequate and that the convicted man will have suffered irreparable injury would seem to be self-evident. But here we can act in time to prevent the additional violation of Section 605 that will occur when the wiretap evidence is divulged and used at the trial.

In *United States* v. *Benanti*, 1957, 244 F. 2d 389, 391, we held:

> "Despite the warrant issued by the New York State court pursuant to New York law, we have no alternative other than to hold that by tapping the wires, intercepting the communication made by appellant and divulging at the trial what they had overheard, the

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New York police officers violated the federal statute. Nardone v. United States, 302 U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314; Id., 308 U. S. 338, 60 S. Ct. 266, 84 L. Ed. 307; Weiss v. United States, 308 U. S. 321, 60 S. Ct. 269, 84 L. Ed. 298. Section 605 of 47 U. S. C. A. is too explicit to warrant any other inference, and the Weiss case made its terms applicable to intrastate communications. The section provides:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *."

We also held, following as we thought the earlier cases, especially *Wolf* v. *Colorado*, 1949, 338 U. S. 25, that the fact that the federal officers had not participated in the wiretap and had no knowledge of it until the fact was brought out at the trial on cross-examination required us to affirm the conviction. In this we were mistaken, as the Supreme Court held the evidence was not admissible. *United States* v. *Benanti*, 1957, 355 U. S. 96. But our ruling[1] that the New York police officers had violated the federal law against divulging the contents of a wiretap, even though authorized by New York state law, was not disturbed. Instead, the Court held at pages 105-6:

> "In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as

[1] See also *United States* v. *Gris*, 2 Cir., 1957, 247 F. 2d 860, 863.

part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy.[18] ''

Footnote 18 reads:

''In passing, it should be pointed out that several Attorneys General of the United States have urged Congress to grant exceptions to §605 to federal agents under limited circumstances. See, *e.g.*, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H. R. 762, 867, 4513, 4728, 5096, 84th Cong., 1st Sess. 28; Rogers, The Case for Wire Tapping, 63 Yale L. J. 792 (1954). But Congress has declined to do so In view of this, it would seem unreasonable to believe that Congress is willing to allow this same sort of exception to state agents with no further legislation on its part.''

We find nothing to the contrary in *Schwartz* v. *Texas*, 1952, 344 U. S. 199, which merely construed Section 605 as precluding ''the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect.'' See *Benanti*, 355 U. S. at page 101. In other words, the rule of evidence that permits proof illegally obtained to be received in evidence is a rule of state law and, in the absence of valid federal legislation to the contrary, the application of such a rule in and of itself does not constitute a violation of the constitutional requirement of due process.

In denying relief the District Judge relied upon *Stefa-*

nelli v. *Minard*, 1951, 342 U. S. 117, where it was held that an injunction would not issue to prevent the New Jersey State Police from using in a state criminal prosecution the fruits of an unlawful search and seizure. But there the violation of the constitutional prohibition had already taken place. Under such circumstances it might well be thought that there was no more involved than a state rule to the effect that evidence illegally obtained was nonetheless admissible. Naturally there was a reluctance to interfere and disturb the delicate balance between federal and state functions, especially in the administration of the criminal laws. Here the very act of the police officers in testifying and divulging the contents of the wiretap will constitute the commission of a separate federal crime *in future*.[2] We do not think we lack power to prevent this. Unless we act now it may well be too late. Surely the delicate balance between federal and state functions does not require the federal courts to sit idly by and countenance or acquiesce in persistent and repeated violations of federal law. Moreover, the fact that the wiretapping is authorized pursuant to the Constitution and legislation of the State of New York, pursuant to which New York judges continue to order wiretapping and police officers do the wiretapping and divulge the contents of the wiretaps in their testimony, even after the Supreme Court has held these constitutional and legislative provisions to be an invasion of a field preempted by the Congress, makes the position of defendants even more untenable.

Accordingly, until the hearing and determination of the

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[2] See *Refoule* v. *Ellis*, D. C. N. D., Ga., 1947, 74 F. Supp. 366, cited in footnote in *Stefanelli* at p. 124.

appeal from the order denying plaintiff's application for a temporary injunction and dismissing plaintiff's complaint, defendants and their agents and employees are hereby enjoined and restrained from using and disclosing wiretap evidence at the trial of Pugach in the County Court of Bronx County, New York, on the two indictments there pending against him.

WATERMAN, *Circuit Judge* (concurring):

I concur but solely on a very limited ground. If we deny the stay and the wiretap evidence is introduced at the trial next Monday, February 15, 1960, the important question presented by this application will not have been timely ruled upon, and, as appears in our opinion in *United States ex rel. Graziano* v. *McMann*, filed herewith, it is probable that nothing can be done thereafter to revive it. As soon as the wiretap evidence is offered and received at the trial and the contents of the wiretaps are thus divulged, the question now before us will have become moot. On the other hand, the granting of the stay will maintain the status quo pending appeal to our Court from the decision below. If we err in so doing, the stay will be promptly vacated by the United States Supreme Court, or a Justice thereof, and defendants will then be free to tender the wiretaps in evidence at the trial in the County Court of Bronx County. Although it is intolerable that the federal courts should so presume to interfere with the orderly progress of the administration of justice in the State Courts by issuing stay orders, the present situation is intolerable, too. It goes against the grain to sit idly

and await the violation of a federal statute one knows is to be violated, while also knowing that the only redress the United States may have after the violation is to proceed under §501 against a conscientious police officer who is only obeying orders.

Moreover, there is uncertainty among the State officers themselves. At least one of the Justices of the New York Supreme Court refuses to sign orders authorizing wiretaps on the ground that they are now clearly illegal under the ruling of the Supreme Court in *United States* v. *Benanti*, 355 U. S. 96 (1957). *Matter of Interception of Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84 (1958) (per Hofstadter, *J.*). But, as disclosed by the affidavits now before us, other Justices of the New York Supreme Court pursue a contrary course and numerous orders authorizing wiretaps are issued. This leaves in the middle conscientious New York State and municipal police officers who have tapped wires pursuant to court order. It could well be that some of them, as the occasion presented itself, might be prosecuted for violating Section 605 when they divulge or publish what they have thus obtained. Such a divulgence would be in violation of the plain prohibition of the Section. Therefore, if at all possible to do so, it is in the public interest to have the present anomalous state of affairs clarified. For this reason, and this reason alone —and with many misgivings—I concur in the granting of the stay. I would point out that we are not enjoining the prosecution itself, but only the introduction at the trial of wiretap evidence.

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MADDEN, *Judge* (dissenting):

The petitioner-appellant's motion for stay of the criminal proceeding in the state court of New York assumes, correctly, that the New York Court will follow the New York rules of evidence, and will admit evidence obtained by tapping the petitioner's telephone.

The New York rule of evidence is,

> that the court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers and other articles of personal property which are material and properly offered in evidence.

The foregoing quotation is from the opinion in *People* v. *Adams*, 176 N. Y. 351, 358, 68 N. E. 636, 638. It was quoted with approval in *People* v. *Richter's Jewelers*, 291 N. Y. 161; 51 N. E. 2d 690.

This rule of evidence is said by the petitioner to have been derived from the common law; to have been introduced into American jurisprudence toward the middle of the nineteenth century; and to have been adopted by a majority of American state jurisdictions.

The petitioner's estimate of the precedents is verified by *Wigmore on Evidence* (3rd Ed.), vol. 8, §§2183-2184b and *McCormick on Evidence*, §§137-142.

That the rule that wire-tap evidence is admissible is only a rule of evidence is confirmed by the highest authority, speaking in 1957, in *Benanti* v. *United States*, 355 U. S. 96, 101. There, Chief Justice Warren for a unanimous Court, distinguished *Schwartz* v. *Texas*, 344 U. S. 199, by saying:

> The rationale of that case is that despite the plain prohibition of Section 605 (the Federal Wiretapping Statute), due regard to federal-state relations precluded the conclusion that Congress intended to thwart a State rule of evidence in the absence of a clear intention to that effect.

What this Court is asked to do in the instant case is to hold that it is a violation of due process of law for a State to apply a rule of evidence which is the rule in a majority of the States of the United States. Can it be that the essentials of "ordered liberty" of decent and rational process of law have been hidden from so many courts and judges and juristic authorities during so many years, and have now at last been revealed, and only to this Court?

The instant petition urges the Federal District Courts to go into the business of supervising the proceedings in State Courts in their day-to-day activities; to take a seat on the bench beside the State Court Judge and direct him how to rule on the admission of evidence offered at the trial. It would be hard to imagine a more intolerable practice, even if it were indulged in by judges of higher rank, but in the same judicial hierarchy. Here again we have recent admonition from the Supreme Court of the United States. In *Stefanelli* v. *Minard*, 342 U. S. 117, Mr. Justice Frankfurter wrote for the Court in a case practically on all fours with the instant one. There the petitioners sought, in a Federal Court, an injunction against the use, in a State criminal proceeding, of evidence obtained by State police by an illegal search. The Supreme Court said, at page 120,

Here the considerations governing that discretion [the discretion of a Court of Equity in determining whether to issue an injunction] touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States.

At pages 123-124 the Supreme Court said:

The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law —with its far flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution.

I would deny the requested stay.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of April, one thousand nine hundred and sixty.

Present:

Hon. J. Edward Lumbard,
Chief Judge.

Hon. Charles E. Clark,
Hon. Sterry R. Waterman,
Hon. Leonard P. Moore,
Hon. Henry J. Friendly,
Circuit Judges.

Burton N. Pugach,
Plaintiff-Appellant,

—v.—

Hon. Isidore Dollinger, District Attorney of Bronx County and Hon. Stephen P. Kennedy, Police Commissioner of the City of New York,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

Further ordered that the stay heretofore granted by this Court on February 11, 1960 be and it hereby is vacated.

A. DANIEL FUSARO
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BURTON N. PUGACH,

Petitioner-Appellant,

—v.—

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, and HONORABLE STEPHEN P. KENNEDY, Police Commissioner of the City of New York,

Respondent-Appellees.

MOTION FOR REHEARING AND STAY

The petition for rehearing is denied with Judge Clark dissenting and voting to grant.

In view of the appellant's intention to apply to the Supreme Court for certiorari, the defendants are enjoined from using and disclosing wiretap evidence until May 16, 1960, provided further that if on or before May 16, 1960 there is filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that a certiorari petition, record, and briefs have been filed, thereupon the stay shall

continue until the final disposition of the case by the Supreme Court. See Rule 28 of the Rules of this Court.

J. EDWARD LUMBARD
U.S.C.J.

STERRY R. WATERMAN
U.S.C.J.

LEONARD P. MOORE
U.S.C.J.

HENRY J. FRIENDLY
U.S.C.J.

I dissent.

CHARLES E. CLARK
U.S.C.J.

26 April 1960